Supreme Court, U.S.
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No. 99-1643

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

vs.

FRED STANTON SMITH, THE BANK OF NEW YORK, and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bankruptcy court had jurisdiction (a) to approve settlement of certain core matters directly related to the Respondent Trustee's duties, and (b) to determine certain related counterclaims of the debtor/Petitioner tried in that court by his consent and after his own invocation of that court's jurisdiction.

2. Whether the court of appeals erred in affirming the district court's affirmance of the bankruptcy court's findings of fact and conclusions of law on the debtor/Petitioner's counterclaims.

3. Whether the court of appeals erred in affirming the district court's affirmance of the bankruptcy court's approval of a settlement relating to the income tax issues following this Court's 1992 ruling.

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the seventeenth attempt in this Court by the debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, approximately 48 appeals to the court of appeals, and approximately twice as many

[1] Two additional petitions were filed with the petition in this case (Case Numbers 99-1642, 99-1644). Of the 15 previous petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

appeals in the district court, in the fourteen years since a creditors' plan of reorganization was confirmed.

For his serial, frivolous, and collateral attacks, the debtor/Petitioner has been sanctioned on several occasions.

A. Nature of the Case

The background of these fifteen-year-old cases and the confirmation of the plan of reorganization (the "Plan") proposed by The Bank of New York (the "Bank") are detailed in opinions of the district court and the court of appeals; *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

The case below was an adversary proceeding in the bankruptcy court for the Southern District of Florida. The Liquidating Trustee (Respondent Smith) appointed by the bankruptcy court to administer the confirmed Plan proposed by the major creditor (Respondent Bank) sought declaratory relief regarding the Trust's liability, if any, to file federal income tax returns and pay any taxes due.

After the extended appellate proceedings described below, the Trustee amended his complaint to seek damages against the Bank for the income taxes and related expenses. The debtor/Petitioner asserted (a) counterclaims against the Trustee and (b) crossclaims against the Bank.

B. Course of the Proceedings, and Disposition Below

The Trustee filed his complaint for declaratory relief and damages in late 1987. The bankruptcy court, the district court, and the circuit court of appeals all concluded that the Trustee had no obligation to file tax returns or pay taxes. *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990). This Court reversed on *certiorari*. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

The Trustee then amended his adversary complaint to recover the taxes and related expenses from the Bank. The Trustee ultimately settled the income tax liabilities with the United States and the bankruptcy court approved that settlement. [Petitioner's App. 63.] The debtor/Petitioner objected to that settlement, and appealed the order approving the settlement to the district court, which affirmed [Petitioner's App. 4], and to the court of appeals, which affirmed. [Petitioner's App. 1.]

In the adversary proceeding, the debtor/Petitioner filed (a) counterclaims against the Trustee alleging breach of fiduciary duty, negligence, and other matters, and (b) crossclaims against the Bank on similar theories. The Trustee and the Bank filed answers denying liability and affirmative defenses that included *res judicata* and the statute of limitations.

Discovery was taken and the matter was scheduled for trial on June 21 and 22, 1993.

After the trial and the submission of memoranda by the parties, the bankruptcy court entered a final judgment, findings of fact, and conclusions of law on September 30, 1993 on the debtor/Petitioner's counterclaims and crossclaims. The bankruptcy court ruled against the debtor/Petitioner on the merits as to each count or claim against the Trustee and the Bank. The bankruptcy court also held that certain affirmative defenses barred the claims asserted by the debtor/Petitioner. [Petitioner's App. 49.] Between the trial and the bankruptcy court's ruling, the Department of Justice approved the proposed settlement of the Trustee's federal income tax liabilities, and the Trustee and the United States jointly moved the bankruptcy court to approve the settlement. That motion was heard on September 21, 1993, and the court approved the settlement by order entered September 30, 1993. [Petitioner's App. 63.] The debtor/Petitioner moved for rehearing, which was denied by the bankruptcy court on November 9, 1993, and that ruling was appealed to the district court, which affirmed. [Petitioner's App. 4.]. The Petitioner appealed to the court of appeals, which affirmed. [Petitioner's App. 1].

C. Statement of the Facts

The salient facts regarding the debtors, their voluntary petitions in 1984 under Chapter 11, and the confirmation of the amended Plan in 1985 are detailed in *Holywell Corp. v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986).

Since that decision, there have been dozens of appeals, unsuccessful collateral attacks by Petitioner in the United States District Court for the Western District

of Virginia and in the state court in Florida, contempt orders against Petitioner for disobedience of court orders,[2] and rulings in favor of the Trustee on Petitioner's never-ending claims of "breach of fiduciary duty" relating to the administration of the Trust.[3]

The primary reason these cases remained open for as long as they did, however, is that the federal tax implications of the Plan presented a novel question that was taken by the IRS and Office of the Solicitor General of the United States to this Court and back.

The Bank's Plan contemplated a short period of administration and the turnover of residual proceeds to the debtors for payment of tax liabilities, if any, arising from the liquidation of assets pursuant to the Plan (and from any pre-confirmation income tax matters).

Initially, Petitioner and his professionals advised the Trustee that the Trust was not a taxable entity, and that the debtors and their accountants would take care of the tax returns. [*See* Petitioner's App. 41.] The Trustee's attorney reached the same conclusion in 1986. *Id.*

By mid-1987, however, the debtors' appeals and collateral lawsuits had reduced the likelihood that the debtors would receive a residual distribution. The debtors changed their legal position; they advised the Trustee that it was *his* responsibility to file income tax returns and pay any taxes with respect to all returns due on or after the commencement of the cases in 1984. *Id.*

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[2] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[3] *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988).

The Trustee denied the existence of any such duty, based on the legal opinion provided to him previously, and commenced the adversary proceeding below to determine his obligations.

For over four years, and in three courts, the Trustee prevailed. *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990). In 1991, the Solicitor General sought *certiorari* on behalf of the United States (as did Petitioner), and this Court granted review. In February, 1992, this Court reversed the lower court opinions and held that the Trustee had to prepare returns and pay any taxes found to be due. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

The Complaint

On remand, the Trustee sought (a) a determination by the bankruptcy court of the income taxes due, and (b) a judgment against the Bank for indemnification and for the alleged failure to include provisions in the disclosure statement and Plan relating to the income tax effects of the Plan.[4]

Debtor/Petitioner included in his answer, counterclaim, and crossclaim, a familiar list of alleged wrongs relating to the Plan that had been raised, judicially rejected, re-raised, and re-rejected. For example, Holywell sought again to claim that the Bank had no right to

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[4] The bankruptcy court found the Bank liable to the Trustee under theories of negligence and indemnity. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). Those claims were settled by the Bank and the Trustee before at trial on damages, and the bankruptcy court approved that settlement.

receive a credit at the closing of the sale of the Miami Center project for some $27 million in post-petition interest [Petition for Cert. at 9, 12], though that claim has been rejected time and time again:

(1) The interest credit was a specific term of the confirmed Plan. Gould's appeals from the confirmation order were unsuccessful.

(2) The amount of interest due the Bank was determined in Adversary Proceeding 85-0160, in a final judgment entered March 20, 1985. The district court and court of appeals considered the interest claims of the debtor/appellants and rejected them; the Eleventh Circuit noted:

> Here, the debtors *again* attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan [emphasis supplied].

In re Holywell Corp., 901 F.2d 931, 934 (11th Cir. 1990) (emphasis added).

(3) The debtor/Petitioner also unsuccessfully challenged the interest credit in Adversary Proceeding 87-0523. The bankruptcy court ruled against the debtor/Petitioner, and the district court dismissed the appeal as moot in an Order entered July 21, 1988.[5]

(4) The debtor/appellants also made this claim in a state court lawsuit removed to the bankruptcy court. The bankruptcy court again dismissed the claims based on

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[5] The court of appeals dismissed Petitioner's further appeal from the district court's ruling, 923 F.2d 865 (11th Cir. 1991), and this Court denied review, 111 S.Ct. 2259 (1991). The petitioner (as usual) sought review of every adverse ruling.

prior adjudication. The district court affirmed, noting that, "the Bankruptcy Court previously held that this credit was valid under the Plan." *In re Holywell Corp.*, 93 B.R. 780, 783 (S.D. Fla. 1988).

The Trustee obtained a bankruptcy court determination that the Bank had indemnified, and was otherwise liable to, the Trustee for the Trust's tax obligations. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee and the taxing authorities settled the tax obligations for approximately $15.8 million. The Trustee paid those taxes from the Liquidating Trust and then obtained a trial date for a determination of the amount of the Bank's liability to the Trust.

The Bank maintained that the Trustee had suffered no damage, as (a) the Trust had been able to pay all such tax liabilities from funds of the Trust, (b) the IRS and state taxing authorities had expressly released the Trustee from personal liability, and (c) the Bank, as a creditor holding unpaid claims of approximately $30 million, was the creditor (and only party) affected by this Court's tax ruling and the subsequent payments.

The Settlement

The Trustee and the Bank then negotiated a settlement of their respective claims and appeal rights regarding the tax matters. The settlement was reduced to a 12-page joint motion by the Trustee and the Bank, and notice was provided to the Petitioner and any other parties remaining on the service list. Objections were interposed by the debtor/Petitioner, and the proposed settlement was heard on June 22, 1994.

At the conclusion of the hearing, the bankruptcy court approved the settlement and entered an Order submitted by the Respondents, who were the settling parties. [Petitioner's App. 31.] The debtor/Petitioner appealed that ruling to the district court, which affirmed [Petitioner's App. 26], and to the court of appeals, which affirmed. [Petitioner's App. 1.] This petition followed.

The joint motion and the schedules attached to that motion provide a detailed factual basis for the settlement. Those facts were not rebutted or disproved by the Petitioner in his objections in the hearing before the bankruptcy court in the appeal to the district court. The advantages of the settlement are apparent from those facts:

1. The Trustee had the right to go to trial regarding his alleged damages in the income tax case, but (a) these "damages" were difficult to argue in light of the fact that only the Bank's claim was affected – the Trustee had suffered no loss himself; and (b) the Bank had announced an intention to appeal the bankruptcy court's order of liability.[6] Further appeals could have added another three years to these cases and consumed even more of the Trust in first-priority legal fee/administration expenses.

2. The Bank held judgments against the Trust of over $29 million. Only $10 million in cash remained in the Trust, of which $1.1 million had already been committed

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[6] The scope of the indemnity and the right of the Trustee to rely on the Bank's disclosure statement, particularly in view of the independent tax advice obtained by the Trustee's own counsel and the debtors' accountants – made the liability issue a difficult one for the Trustee.

to settle the last claims of the IRS. Under any scenario, then, an "income tax damages" recovery by the Trust against the Bank would merely flow directly to the Bank in satisfaction of the Bank's judgments. At the end of the day, the Bank's remaining claims would still far exceed the funds available in the Trust to pay the Bank.

3. The resulting settlement is merely a setoff, appropriate in light of the mutuality of the obligations. The settlement also included conditional agreements not to appeal, saving both parties' time and legal fees.

4. The Trustee compromised a "best case" claim of $18,254,533.52 for a $15 million reduction of the Bank's Trustee's Certificate claim. [Petitioner's App. 32.] The discount merely represents a seasoned trial and bankruptcy lawyer's assessment of the hazards on appeal.

5. The Trustee retained the right to assert other claims against the Bank if such claims do not relate to the income tax dispute. [Petitioner's App. 33.]

6. The settlement did not purport to bar the debtor/Petitioner from attempting to offer evidence of allegedly greater damages to the bankruptcy court. The debtors sought to offer such evidence, but those claims had previously been adjudicated adversely to the debtors in the income tax adversary proceeding.[7] *Id.*

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[7] The debtors also sought to re-assert such claims against the Trustee in the "Trustee's Certificate adversary proceeding". The bankruptcy court entered sanctions against the debtor/Petitioner for re-asserting those previously-adjudicated claims; as usual, the debtor/Petitioner appealed to the circuit court, which affirmed.

7. Because the settlement calculus could be affected by other pending appeals, the Bank and the Trustee included several conditions subsequent, [*id.*], that could "unwind" the settlement, as well as a mechanism for the Bank's repayment to the Trustee of any settlement funds received before the "unwinding". [*Id.*]

There was never any factual, rational, or legal basis for the debtor/Petitioner's opposition to the settlement.

SUMMARY OF ARGUMENT

The debtor/Petitioner seeks review of an order from the court of appeals affirming two district court orders (the second of which affirms five separate bankruptcy court orders[8]):

> (1) Order Affirming Bankruptcy Court's Order Granting Joint Motion for Approval of Settlement of Trustee's Claims Regarding Income Taxes and Related Expenses (dated July 7, 1997).
>
> (2) Final Order Affirming Bankruptcy Court's Orders (dated January 20, 1995).

[8] Orders 2(a), 2(b), and 2(c) concern certain procedural matters not addressed by debtor/Petitioner's brief. Because the debtor/Petitioner apparently does not appeal these orders, they are not addressed by this response brief. Issues not briefed "are deemed abandoned." *Rogero v. Noone*, 704 F.2d 518, 520 n.1 (11th Cir. 1983); *see also Zucas v. Hinson*, 124 F.3d 1407, 1408 n.1 (11th Cir. 1997).

(a) Order Denying Motion of Defendants Theodore B. Gould and Holywell Corporation to Amend Answer to Join Additional Parties (dated June 28, 1993).

(b) Order Denying Theodore B. Gould's Motion for Separate Trial (dated June 28, 1993).

(c) Order Denying Holywell Corporation and Theodore B. Gould's Motion for Rehearing of June 22, 1993 Order Denying Motion to Enjoin Trustee from Use of Trust Funds to Pay Taxes (dated August 27, 1993).

(d) Final Judgment on the Debtor's Counterclaims against the Trustee and Cross-Claims Against the Bank of New York (dated September 30, 1993).

(e) Order Denying Motion of Theodore B. Gould for Rehearing of Order Approving Stipulation and Joint Motion for Approval of Compromise and Settlement of Claims of the United States of America (dated November 9, 1993).

The Bankruptcy Code expressly permits the bankruptcy court to determine federal income tax issues in bankruptcy cases such as this. Indeed, the debtor/Petitioner himself invoked the jurisdiction of that court by asserting his counterclaims and crossclaims there. His attempts to have the tax issues determined administratively or by the United States Tax Court would have delayed these cases – a result constantly sought by Petitioner – another five years.

The settlement with the IRS is well within the zone of reasonableness, and was praised by Petitioner himself in

open court. The Trustee knocked out $15 million in indebtedness and avoided a difficult appeal regarding novel questions of bankruptcy, contract, and tax law. For its part, the Bank obtained the settlement of disputes by the Trustee about the amount of the Trustee's Certificate and a discount of $3,254,533.32 (about 18%) against the total damages claimed by the Trustee. The debtor/Petitioner advances no rational justification for challenging this settlement.

ARGUMENT

I. The Bankruptcy Court Had Subject Matter Jurisdiction

A. Code Section 505

11 U.S.C. § 505(a) expressly permits a bankruptcy court to "determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed . . . ". The taxes had to be determined and paid as priority claims before the remaining claims against the debtors could be paid and the cases closed. 28 U.S.C. § 157(b)(2)(A) provides that "matters concerning the administration of the estate" are "core" bankruptcy matters. Similarly, § 157(b)(2)(O) characterizes as a "core" matter a proceeding "affecting the liquidation of the assets of the estate." It is abundantly clear, therefore, that the bankruptcy court had jurisdiction over the Trustee's adversary proceeding. Neither the IRS nor the Trustee opposed that jurisdiction. Other courts have also upheld the exercise of such jurisdiction. *In re Goldblatt Bros., Inc.*, 106 B.R. 522, 529 (Bankr. N.D. Ill.

1989); *In re Major Dynamics, Inc.*, 14 B.R. 969, 972 (Bankr. S.D. Cal. 1981).

B. Remand

The adversary proceeding below began in 1987 as a request for a declaration of (a) the Trustee's obligation, if any, to file income tax returns, and (b) the amount of taxes due, if any such obligation existed. The lower courts never adjudicated the amount of tax due because they determined as a threshold matter that the Trustee had no duty to file returns. In his various appeals from these rulings, the debtor/Petitioner either did not raise, or raised and lost, the issue of subject matter jurisdiction. In other words, if the bankruptcy court had no subject matter jurisdiction over this adversary proceeding initially (as alleged by Petitioner), it would follow that the appellate courts – including this Court – lacked jurisdiction as well.

But this Court did have jurisdiction, of course, as did the lower courts. When this Court reversed the lower court rulings,[9] the lower courts dutifully remanded the case to the bankruptcy court for the determination of the taxes. A "mandate" is so entitled because the lower court is "commanded" to complete the judicial labor arising as a result of the higher court's decision. The debtor/Petitioner argues, in effect, that the bankruptcy court should simply have ignored the remand and the mandates of the higher courts, and done nothing further in the remanded adversary proceeding. The argument is specious. The

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[9] *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

district court correctly held, "subject matter jurisdiction is proper due to the original posture of this case and its subsequent removal from the Supreme Court" [Petitioner's App. 20-21.]

C. Waiver and Estoppel

The debtor/Petitioner himself affirmatively *invoked* the jurisdiction of the bankruptcy court in both the income tax adversary proceeding and the Trustee's Certificate adversary proceeding. In each instance, the debtor/Petitioner asserted crossclaims and counterclaims against the Bank and the Trustee and alleged that jurisdiction existed for purposes of those cross-claims and counterclaims. Having lost on the merits in the bankruptcy court, this pugnacious and tireless litigant now wants this Court to hold that some hapless state court judge should try to unravel these bankruptcy-related issues.

The debtor/Petitioner argues that the bankruptcy court lacked subject matter jurisdiction to decide the counterclaims he asserted. He nonetheless alleged in paragraph 57 of those counterclaims:

> 57. This counterclaim arises out of the transaction and occurrences of Plaintiff's claims for relief and is therefore compulsory within the meaning of the Federal Rules of Civil Procedure 13(a); the Court's *jurisdiction of this counterclaim is granted by the doctrine of ancillary jurisdiction*. [Emphasis supplied].

The bankruptcy court may try even non-core matters if the parties consent. 28 U.S.C. § 157(c)(2); *In re M.A.*

Baheth Constr. Co., 118 F.3d 1082, 1084 (5th Cir. 1997). The debtor/Petitioner has either consented to the bankruptcy court trying the case, which he may do, or has waived any error by inviting it. *Id.*; *see also Wood v. President & Trustees*, 978 F.2d 1214, 1223 (11th Cir. 1992).

The debtor/Petitioner's proposition that a non-bankruptcy judge should construe and enforce the provisions of a confirmed plan of reorganization is both novel and absurd.

Post-confirmation jurisdiction in such matters is also found in 11 U.S.C. § 1142.

II. The Final Judgment, Findings, and Conclusions Are Correct With Respect to the Claims of the Debtor/ Petitioner

The final judgment incorporates findings and conclusions that, as to the debtor/Petitioner, are based upon duly-admitted evidence and upon applicable case law. The findings of fact have not been demonstrated to be clearly erroneous. The cases cited in the conclusions of law are applicable and have not been overruled.

The debtor/Petitioner does not point to a single factual finding that is clearly erroneous. Rather, he appears to be rearguing his case as if this Court were the trial court. As the district court held when reviewing the bankruptcy court's judgment, "Debtors have not shown that the Bankruptcy Court's factual findings are clearly erroneous" [Petitioner's App. 22.] The Petitioner did not show clear error there and has not shown it here. Before the court of appeals, the second level of appeal, the

clearly erroneous standard was given "strict application." *Birmingham Trust National Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340 (11th Cir. 1982). This Petition is the third level of appeal.

The district court also affirmed the bankruptcy court's conclusions of law [Petitioner's App. 22], including a conclusion that the debtor/Petitioner's claims were barred by *res judicata* and collateral estoppel, and factual findings concerning his contributory negligence, inequitable conduct, waiver, estoppel, and a host of other reasons barring recovery [Petitioner's App. 38-60.] These alternative grounds for affirming judgment are ignored by the debtor/Petitioner, and for that reason alone the Petition should be denied.

III. The IRS Settlement Was Properly Approved by the Bankruptcy Court

The bankruptcy court devoted two evidentiary hearings to the settlement and Petitioner's objections to the settlement. Petitioner objected to the release of the Trustee from personal liability and to the elimination of net operating loss carry-forwards to future years. The debtor/Petitioner did not offer a tax lawyer, tax accountant, or other expert witness to explain any reason for disapproval of the settlement.

The bankruptcy court's June 22, 1994 Order approving the settlement, [Petitioner's App. 31], correctly cites applicable law with respect to compromises and the review of proposed settlements by a bankruptcy court. It is the policy of the law in general, and of bankruptcy law in particular, to favor settlements. *Florida Trailer & Equip.*

Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). The narrow legal issue, correctly addressed in the order under review here is whether the settlement is below, "the lowest point in the range of reasonableness". *In re Teltronics Servs., Inc.*, 762 F.2d 185, 189 (2d Cir. 1985).

Nothing presented by the debtor/Petitioner at the hearing or in his brief, establishes any defect or unfairness in the settlement terms. Thus, as the district court correctly concluded, the bankruptcy court did not abuse its discretion in approving the settlement [Petitioner's App. 26], and the court of appeals correctly affirmed. [Petitioner's App. 1.]

CONCLUSION

None of the appropriate grounds for *certiorari* are present. The three lower courts correctly and unanimously ruled that Petitioner's claims are barred, that the bankruptcy court had jurisdiction, and that the court properly exercised its discretion in approving the settlement of the tax claims and entering judgment against Petitioner on his counterclaims and crossclaims. For all

these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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